




**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

**JUN - 7 2018**

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Impartiality Determination to Participate in Certain Matters Involving the State of Wisconsin

**FROM:** Kevin S. Minoli   
Designated Agency Ethics Official and  
Principal Deputy General Counsel

**TO:** Anna J. Wildeman  
Deputy Assistant Administrator  
Office of Water

As the Deputy Assistant Administrator for Water of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the State of Wisconsin. Within the last year, prior to being selected for this position, you served as Director of the Environmental Protection Unit of the Wisconsin Department of Justice.

As an Administratively Determined (AD) appointment, you are not required to sign President Trump's Ethics Pledge because this type of appointment falls outside the definition of "appointee" set forth at Executive Order 13770 at Section 2(b).<sup>1</sup> However, what remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." Upon assuming the position of Deputy Assistant Administrator, you will have a "covered relationship" with the State of Wisconsin pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date you resigned from the Wisconsin Department of Justice, absent an impartiality determination from me, you cannot participate in any specific party matter in which the State of Wisconsin is a party or represents a party if that matter is likely to have a direct and predictable effect upon the State or if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

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<sup>1</sup> See Office of Government Ethics advisories entitled "Guidance on Executive Order 13770," LA-17-03 (3/20/17) and "Executive Order 13770," LA-17-02 (2/6/17), which apply the following OGE advisories from the last administration in full: "Who Must Sign the Ethics Pledge?" DO-09-010 (3/16/10); and "Signing the Ethics Pledge," DO-090-005 (2/10/09).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that the Agency takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

As the Deputy Assistant Administrator, you serve as a key advisor to the Assistant Administrator in certain key aspects under his purview. As part of the Office of Water's senior leadership team, your area of responsibility includes major rulemakings, research strategies and program initiatives. You will be expected to communicate freely with the states, including Wisconsin, and may be asked to participate in discussions and meetings related to particular matters that affect the State. Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Deputy Assistant Administrator in particular matters that involve the State of Wisconsin with the following limitation: you must recuse yourself from participation in EPA specific party matters if you participated personally and substantially in the same specific party matters while employed with the Wisconsin Department of Justice. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2016, you have served as an Assistant Attorney General and the Director of the Environment Protection Unit of the Wisconsin Department of Justice. In this role, you prosecuted violations of Wisconsin's environmental and natural resources laws, defended administrative decisions and rules issued by the Wisconsin Department of Natural Resources, and managed the Environment Protection Unit. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the Wisconsin Department of Justice. States share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Effect of the matter upon your financial interest – I understand that you have a defined contribution plan with the State of Wisconsin but are not vested in its defined benefit plan. You



do not, therefore, have a financial conflict of interest pursuant to 18 U.S.C. § 208.

Nature and importance of the employee's role – As Deputy Assistant Administrator, you are expected to communicate freely with states, including Wisconsin.

Sensitivity of the matter – We anticipate that there may be specific party matters in which you did not participate personally and substantially for the Wisconsin Department of Justice that will rise to your level of attention, merit your participation and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as Deputy Assistant Administrator in such matters will be of importance to the Assistant Administrator, and therefore, in the Agency's interests. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in new or future specific party matters that involve the State of Wisconsin, but not on the very same specific party matters on which you worked on personally and substantially while employed by the Wisconsin Department of Justice. You do not anticipate that any particular matter involving Wisconsin as a specific party in which you previously participated personally and substantially will arise at EPA, but if it should, then we have advised and you have agreed not to participate in it at all for the duration of your EPA tenure. If, however the Agency determines that we have a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you or your Assistant Administrator may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis and consistent with your applicable bar rules. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated.

While I have issued you this determination to interact with the State of Wisconsin with the limitation described above, please note that you may wish to make adjustments to your duties to not participate in a particular matter that involves Wisconsin. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to confer with OGC/Ethics should such a circumstance arise.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Justina Fugh at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or (202) 564-1786.

cc: Dennis Lee Forsgren, Jr., Deputy Assistant Administrator  
Benita Best-Wong, Acting Deputy Assistant Administrator  
Justina Fugh, Senior Counsel for Ethics